

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD LEE OLMAN,

Defendant-Appellant.

---

UNPUBLISHED

June 12, 2007

No. 268464

Macomb Circuit Court

LC No. 2005-000998-FH

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Defendant appeals of right his jury-trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years of age). Defendant was sentenced to 2 to 15 years' imprisonment. We affirm defendant's conviction, but remand for resentencing.

Defendant argues that the trial court erred when it determined that the victim of the sexual assault at issue was competent to testify. We disagree. We review a trial court's determination regarding the competency of a witness for an abuse of discretion. *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001).

MRE 601 provides the general rule regarding witness competency:

Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

In determining the competency of a witness to testify, the test is whether the witness has the capacity and sense of obligation to testify truthfully and understandably. *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998). Further, as to a child witness, the court must ascertain whether the witness has sufficient intelligence and a sense of obligation to tell the truth. *Id.* Once a trial court examines a child witness and determines her to be competent to testify, a subsequent showing of the child's inability to testify truthfully reflects on credibility, not competency. *People v Cobb*, 108 Mich App 573, 576; 310 NW2d 798 (1981).

The victim of the sexual assault was four years old at the time of the assault and five years old when she testified at trial. The judge, defense counsel, and the prosecutor extensively

explored the competency issue with the victim. First, the victim was asked preliminary questions with regard to personal information, schooling, her friends, and various activities. She answered truthfully and understandably. With respect to capacity and sense of obligation to testify truthfully, the victim testified that she knew the difference between the truth and a lie. She defined a lie as when “you didn’t tell them the real thing.” She also testified that when someone tells a lie, “they get in trouble.” When asked whether she would promise to tell the truth in court, the victim indicated that she would.

We note that when the trial judge asked the victim whether it would be a lie to say that his black robe was red, the victim initially suggested that it would not be a lie.<sup>1</sup> However, the victim then went on to clarify that the judge’s robe was in fact black. Evidencing an increasing understanding of the issue, the victim subsequently testified that the prosecutor’s jacket, which was in fact black, “would still be black” even in spite of the judge’s suggestion that it was red.

Of importance, there was no testimony to suggest that anyone had instructed the victim with regard to her allegations against defendant. A review of the record also reveals that there was no indication that the victim was making up a story or being untruthful in her testimony. Further, the victim’s testimony, especially with regard to the incident in question, was not prompted by leading questions. We conclude that the victim was competent to testify because (1) she testified that she recognized the difference between the truth and a lie, (2) she testified that people who lie get into trouble, (3) she promised to tell the truth, and (4) her follow-up testimony clarified that she knew it was a lie when the judge stated that his robe was red instead of black. The trial court did not err in determining that the victim was a competent witness. MRE 601.

Second, defendant argues that the trial court erred in admitting testimony from two police detectives who commented on defendant’s credibility. We agree, but conclude that this trial defect did not constitute outcome-determinative plain error.

Generally, a trial court’s decision to admit evidence will be reversed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, we review defendant’s unpreserved claim of evidentiary error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that (1) an error occurred, (2) the error was plain, and (3) the plain error affected the defendant’s substantial rights, i.e., it affected the outcome of the lower court proceedings. *Id.* at 762-763.

Detectives Reese and Sobah testified that they believed defendant was not telling the entire truth when he gave them a statement that he never asked the victim to touch his penis and he never gained any sexual gratification from the touching. Defendant testified at trial that the statement he gave to police is the truth and the entire truth. Because matters of credibility are to

---

<sup>1</sup> Defendant suggested that the victim’s response in this regard indicated that she would mold her testimony into whatever an authority figure wanted her to say. However, the record does not support such a sweeping contention.

be determined by the trier of fact, it is improper for a witness to comment or provide an opinion on the credibility of another witness. *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). Specifically, it is improper for a witness to opine that another person has lied. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). The above testimony was improper because the officers opined that defendant, who went on to testify after the officers, was not telling the entire truth. Defendant testified that the statement he gave to police—namely, that he never asked the victim to touch his penis and derived no sexual pleasure from it—was truthful and embodied the entire truth. The officers’ testimony that defendant’s statement was not the truth constituted an improper commentary on defendant’s credibility. It was for the jury, who saw not only defendant’s testimony, but also the videotape of defendant’s statement to police, to decide whether defendant was telling the entire truth. *Knapp, supra* at 384. Accordingly, the trial court erred when it admitted the officers’ testimony in this regard.

However, reversal is not proper where defendant cannot establish that the error was outcome determinative. *Carines, supra* at 762-763. Excluding Sobah’s and Reese’s challenged testimony, the jury was still presented with sufficient evidence tending to show that defendant committed the charged offense. The testimony of the victim and her mother, defendant’s admission that the victim touched his penis, and defendant’s lack of credibility given his often changing statement to police were sufficient to support the finding that defendant committed the charged offense. Defendant has failed to establish plain error with respect to the admission of the officers’ testimony.

Finally, defendant argues that the trial court abused its discretion in deviating from the sentencing guidelines and that he should be resentenced. We agree.

Whether a particular sentencing factor exists is a factual determination for the sentencing court to determine, and it will be reviewed for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). Whether a particular sentencing factor is objective and verifiable is reviewed de novo. *Id.* Whether the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs when the sentencing court chooses an outcome that falls outside the permissible principled range of outcomes. *Id.* at 269.

MCL 769.34(3) provides in relevant part:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.

A substantial and compelling reason must be an objective and verifiable reason that keenly or irresistibly grabs the court’s attention, is of considerable worth in deciding the length of a sentence, and exists only in exceptional cases. *Babcock, supra* at 258. “The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b).

Defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and sentenced to 2 to 15 years' imprisonment. Because the "intermediate sanction" mandate in MCL 769.34(4)(a) is applicable to the instant case, the guidelines call for at most 12 months in jail, and probation.

Defendant's prior record variable score is zero. Defendant received ten points for Offense Variable (OV) 4, which takes into account that serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(a). Defendant also received ten points for OV 10, which takes into account (1) that the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or (2) that the offender abused his authority status. MCL 777.40(1)(b).

During the sentencing hearing, the trial court discussed the upward departure:

[B]ased upon the age of this child, based upon the statements the child gave to the police department, and to her mother, based upon her age, and based upon the fact that if in fact a victim was twelve years old and fully clothed and an individual grabbed her buttocks you'd be faced with the same sentence guideline as 0 to 17, that is totally unfair.

Given the above articulation, it appears that the trial court based its upward departure on (1) the victim's age, (2) the victim's statements to her mother and law enforcement, and (3) the perceived inequity of the sentencing guidelines which provide identical sentences for someone in defendant's position and someone who grabs the buttocks of a fully clothed 12-year old—presumably a less egregious offense in the estimation of the trial judge.

The victim was four years old at the time of the offense. Although the victim's age is an objective and verifiable factor, it was already taken into account in determining the appropriate sentence range. Defendant received ten points for OV 10, which takes into account that "the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship," or that "the offender abused his or her authority status." MCL 777.40(1)(b). Presumably, defendant received the ten points because of the victim's "youth or agedness" and possibly because defendant, as the victim's babysitter, "abused his or her authority status." MCL 777.40(1)(b). The prosecution argued that although OV 10 takes into account "youth or agedness," it does not adequately assess the victim's very young age. The prosecution presents no legal authority to support this position. The plain language of the statute provides that youth is accounted for. There is nothing to indicate that OV 10 divides young victims into different classes or gradations depending on their exact ages. The prosecution's argument might be more persuasive if MCL 777.40(1)(b) provided for gradations of age. However, that is not the case here. The ten points defendant received for OV 10 were based, at least in part, on the victim's youth and there is no legal authority to suggest that youth aged four are not sufficiently accounted for by the statute. Therefore, the victim's age is not a proper basis upon which to deviate from the guidelines. MCL 769.34(3)(b).

Second, the victim's statements to her mother and law enforcement regarding the assault, although objective and verifiable, did not amount to a substantial and compelling reason to depart from the guidelines. On the morning after the incident, the victim told her mother that she and defendant had a secret, and proceeded to describe the instant offense to her mother. The

victim recounted a similar version of events to law enforcement. Essentially, the victim's statements illustrated the components of the charged offense. The victim's statements were recounted in detail at trial and provided evidence for defendant's conviction. Certainly the statements are noteworthy in that they tell of defendant's egregious conduct toward a young child. However, the trial court did not demonstrate how the statements amounted to substantial and compelling reasons for departure. It appears that the trial court found the statements compelling insofar as they illustrated the elements of the offense, which offense was undoubtedly disturbing. However, the egregiousness of the offense is already reflected in defendant's OV score. Defendant received points for exploiting the victim's youth, exploiting his authority status and causing the victim serious psychological harm. To the extent that the trial court had in mind a specific feature of the offense or offender not accounted for by defendant's OV score, we would have to speculate on the matter as the record is devoid of any such information. Accordingly, the trial court did not meet its burden in establishing that the victim's statements provided substantial and compelling reasons for departure.

As a third basis for a departure, the trial court pointed to the inequity of the sentencing guidelines as evidenced by the proposition that an offender who touches the buttocks of a fully clothed 12-year-old victim would receive a minimum sentence range identical to defendant's minimum sentence range. First, due to the distinctly different facts involved in a scenario where an offender grabs the buttocks of a fully clothed 12-year-old child, it is not at all clear that such offender would receive the same offense variable score as defendant in the instant case. Therefore, the premise upon which the trial court departed is potentially faulty. Second, even assuming that such a hypothetical offender would receive the same sentencing range as defendant, the trial court's claim that the guidelines are therefore unfair is not a proper basis for departure. Such a claim is not objective and verifiable. Moreover, even if the trial court truly believed that defendant's offense was more egregious than certain other criminal sexual conduct offenses, the fact that the statutory sentencing guidelines might have seemed unwise or impolitic in this case was a matter for the Legislature and not for the trial court. *People v Valentin*, 220 Mich App 401, 416; 559 NW2d 396 (1996). Defendant's offense was undoubtedly disturbing. Nevertheless, the trial court did not articulate substantial and compelling reasons, which were not already accounted for in determining defendant's appropriate sentence range, to justify a departure. The trial court abused its discretion in deviating from the sentencing guidelines, and defendant must be resentenced.

Should the court on remand again exceed the guidelines range, it must articulate the reasons for the departure and take care that the reasons are not already accounted for in determining defendant's sentence. MCL 769.34(3)(b).

We affirm defendant's conviction, but remand for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto  
/s/ Kathleen Jansen  
/s/ Bill Schuette